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THE VOICE OF BUSINESS IN EUROPE

5.1/10/1

Mr Alexander Schaub
Director-General
Internal Market DG
European Commission
200 rue de la Loi
1049- Bruxelles

13 May 2004

THE SECRETARY GENERAL

Dear Mr Schaub, Dear Alex,

Thank you for your letter of 21 April 2004 in response to our assessment of the current package regarding the Community Patent.

We appreciate that you share industry's view on the importance of the unitary character of the Community Patent. It appears, however, that there are some differences regarding the interpretation of this term. Whereas it is true that the Community patent will be valid or invalid for the whole territory of the EU, this is not sufficient for the needs of industry. Unitarity in our understanding necessarily requires the same scope and interpretation of both the terms and the content of the Community Patent throughout the EU – this applies for validity/invalidity as well as for infringement issues (which, according to the proposed judicial system will in most cases be dealt with by the same court and in the same proceedings anyway).

In your answer, you indicate that inaccuracies in translations can only be raised in infringement proceedings. However, this is the key commercial value of a patent, namely the possibility to prevent infringers from using the patentees' proprietary intellectual property. There are relatively few other occasions when problems with the interpretation in different languages will be raised.

The main benefit of a Community Patent with a true unitary character, i.e. with the same scope of protection for the whole territory of the EU, would be the possibility of effective enforcement throughout the EU without endless discussions on differences in translations, which would basically prohibit preliminary measures as an important means to avoid irreparable harm to the patentee.

You compare the proposed Community patent system with the existing European Patent system and point out that you cannot see how the current proposals can be worse than the existing situation. We would like to elaborate on this point in somewhat more detail.

In your letter, you mention Article 70(3) of the European Patent Convention (EPC) as a point of reference. Nevertheless, Article 70(3) EPC is, due to an unfortunate development over time, one of the greatest weak points of the EPC system and is not, in industry's view, the right point of reference.

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The problems associated with this article have led to the development outlined in our previous communication, namely that infringement proceedings are concentrated to German courts whose decisions are then used as a basis for settlements in other countries. The language of the proceedings in German courts is German, i.e. only one official language and not, as currently proposed in the Community Patent jurisdiction proposals 21 different languages. Furthermore, the only possible translation issues arising are between the German language and the English or French language as the European Patent is filed in one of these languages. If one takes into account that approximately 40% of all European Patent applications are filed in the German language already, this reduces translation issues even further. The remainder of 60% can be split into approximately 55% of the applications filed in the English language and 5% filed in French. Thus, the potential translation issues in German courts when deciding on European Patents are reduced to issues between German and English – two languages widely used and familiar to most of the litigating parties and their representatives. If translation issues arise, however, they most often pose significant problems in these cases.

Therefore, the parties to litigation proceedings relating to European Patents have chosen German courts to reduce the translation issues to the greatest extent possible.

The situation with the proposed Community Patent and the related jurisdiction proposals is completely different. The Community Patent court would have to use the language of the defendant, which, as of 1 May 2004, would mean any one of 20 different languages. Even worse, the scope of the patent could be different from one member state to another, depending on translation issues – again between 20 different languages.

The escape route which is currently used with the EPC (i.e. one court with one language) would not be possible under the current proposals regarding the Community Patent system, due to the mandatory requirement to have the language of the defendant as the language of the proceedings. This is why, in industry´s view, the proposals being discussed are worse than the present system, which we consider to be far from ideal.

In addition, it is difficult to see how in validity/invalidity proceedings the relevant language of the patent can be different from the relevant language in infringement – since the invalidity counterclaim is the usual defence of the infringer, this would lead to a combined invalidity/infringement proceedings where two different languages are used for the interpretation of the same patent before the same court at the same time.

We can accept that we have to look at the situation from the point of view of third parties as well as patent holders, but in a balanced way and not only in favour of the alleged infringer as is the case in the discussion on translation inaccuracies.

The scenario you refer to in the first paragraph on page 2 of your letter is a hypothetical one since there are no patents granted by the EPO in Spanish and the situation you refer to can only occur if a German company infringes in Spain. In that case there are no possibilities to invoke translation inaccuracies. Since, as outlined above, to avoid the translation issues, the majority of the cases are brought before German courts, provided they have jurisdiction in the case, this scenario is of no relevance.

Additionally, UNICE would like to express its strong concerns regarding the fact that the latest Irish proposals abandon one of the most basic principles of the common market, namely the free movement of goods within the Community. UNICE has serious doubts as to whether these proposals with a limited use right for only one EU Member State following infringement proceedings and the prohibition of distribution in other Member States are in line with the 30-year long jurisprudence of the European Court of Justice on parallel imports within the EU. An infringer could easily overcome this by selling in the country he is authorized to do so and the buyer distributing the product in other EU countries without the patentee being able to prevent this.

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UNICE has always stressed that the target for the Community Patent should not be to improve only slightly the current situation under the EPC system, which we consider to be too expensive. The benchmark should be with the USA and Japan. These economic regions are the EU's main competitors and if we want to take a serious step towards accomplishing the goals of the Lisbon agenda, we have to improve EU's competitiveness.

Contrary to your assertion, we still firmly believe that the only valid comparison should be with the USA and Japan. If we deviate from the Lisbon objectives with the argument "that the EU is made up of independent states with their own official languages", we give up on one of the EU's major goals, namely to increase competitiveness by acting as one economic region.

In our view, the cost of €23,000 for a Community Patent is not realistic. If we do have translation with a legal effect, we have to face translation costs which are significantly higher per page of claims than a conventional translation. Any translator liable for the accuracy of the translation would read the full specification of the patent when translating the claims to avoid translation errors. This would significantly increase translation costs well beyond the figures underlying the current calculation. Furthermore, in view of the lack of qualified translators in a significant number of EU Member States, the costs for translation in those countries especially will be higher than, for example, translations into English. All these factors together lead to the figure of appr. € 79,000 referred to in our letter.

The Commission's original proposal, which required translation into three languages would have been better than what is currently being debated as well as the EPC cost situation. This is the reason, why industry supported it. It would at least have been a step towards reduction of costs even though, as you rightfully note, not completely down to the levels in USA and Japan.

I would also like to make clear that even though we have supported the original Commission proposal despite its departure from UNICE's position (one single language), this was already a concession we made to show our understanding of the Commission's difficult position in the language issue.

Finally, we must ask the question: if the Community Patent does not correspond to the needs of the users', who will use it?

We hope that the above-mentioned provide you with more detailed and reliable arguments to explain why UNICE representing European industry cannot support the current proposals for the Community Patent.

Yours sincerely,

Phillippe de Buck